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IN THE

Supreme Court of the United States

October Term, 1940.

No. 618

THE UNITED STATES OF AMERICA,

Appellant,

versus

PATRICK B. CLASSIC, JOHN A. MORRIS, BERNARD W. YEAGER, JR., WILLIAM SCHUMACHER, AND J. J. FLEDDERMANN,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

SUPPLEMENTAL BRIEF OF DEFENDANTS AND APPELLEES IN REPLY TO BRIEF OF APPELLANT.

WARREN O. COLEMAN,
1329 Whitney Building,
New Orleans, Louisiana,
CHARLES W. KEHL,
FERNANDO J. CUQUET, JR.,
Carondelet Building,
New Orleans, Louisiana,
Attorneys for Defendants
and Appellees.

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MISCELLANEOUS.

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CONGRESS DERIVES POWER TO REGULATE ELECTIONS FROM SEC. 4 OF ART. I, NOT SEC. 2 OF ART. I OF CONSTITUTION OF THE UNITED STATES.

Throughout appellant's brief, mention is made of Sec. 2 of Art. I of the Constitution, as the source of the power of Congress to enact Sections 19 and 20 of the Criminal Code.

Undoubtedly Congress obtains its power to legislate in connection with Congressional elections from Section 4 of Article I. This was originally held by this Court in *Ex parte Yarbrough*[1] and when the question was next raised[2] the *Yarbrough* case was cited with approval. Thereafter all of the cases on this subject are based on the assumption that the source of Congressional power to regulate Congressional elections is derived from Section 4 of Article I, and not on Section 2 of Article I.

It is clear that the choosing of the members of the House of Representatives has reference to the manner of making that choice, as stated in Article I, Section 4 which refers to holding elections. It is likewise clear that the "electors" spoken of in Section 2 of Article I, are the persons who vote at the "elections", spoken of in Section 4 of Article I.

Apparently appellant seems to rely as little as possible on Section 4 of Article I, thus avoiding the argument that will be raised as to the meaning of the word "elections", as used in that section, and as understood at the time of the adoption of the Constitution. Appellant seeks to make a distinction between the word "election", as stated in that Section, as against the word "chosen", as spoken of in Section 2, but it is clear that whatever power Congress has to pass laws concerning Congressional elections

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[1] Ex parte Yarbrough, 110 U. S. 651, the Court said, "So also, has the Congress been slow to exercise the powers expressly conferred upon it in relation to elections by the 4th Sec. of the 1st Art. of the Constitution.

"It was not until 1842 that Congress took any action under the powers here conferred," etc.

U. S. v. Gradwell, 243 U. S. 476, the Court said, "The power of Congress to deal with the election of Senators and Representatives is derived from Sec. 4 of Art. 1 of the Constitution of the United States.

[2] U. S. v. Mosely, 230 U. S. 385.

is derived from Section 4 of Article I, not from Section 2 of Article I. We have discussed in our original brief the history of this enactment, showing that it was a limited power given Congress and not a general one.

There is no clearly defined authority for assuming that Congress has a general power of legislation concerning federal elections. The power to regulate the election of senators and representatives comes wholly and entirely from Article I, Section 4 of the United States Constitution.[3]

In the *Yarbrough* case, in which the specific question was the right of Congress to punish criminally a conspiracy to intimidate a citizen in the exercise of his right to vote under #5508 R. S., the court reviews the regulatory statutes previously enacted by Congress for the control of elections and definitely grounds them upon the express authority of Art. I, Sec. 4.

When the 17th Amendment, providing for the popular election of senators, was first reported on January 11, 1911 by Senator Borah of the Senate Judiciary Committee, it contained a clause providing that it should be in lieu of Sec. 4 of Art. I insofar as it related to any authority in Congress to make or alter regulations as to the time or manner of holding elections for senators. But this clause was omitted and all reference to Sec. 4 of Art. I was eliminated from the resolution. "As finally submitted and adopted the amendment," says the Supreme Court in

[3] Ex parte Siebold, 100 U. S. 271; Ex parte Clark, 100 U. S. 399; Ex parte Yarbrough, 110 U. S. 651.

Newberry v. U. S.,[4] "does not undertake to modify Article I, Sec. 4, the source of congressional power to regulate the times, places and manner of holding elections." That section remains intact and applicable to the election of senators and representatives.[5]

There is another provision of the Constitution which may be here noted, namely Article I, Sec. 5, which makes each house the judge of election of its members which could be considered along with Article I, Sec. 2, para. 1 which says that the House of Representatives shall be composed of members chosen by the people of the several states. These clauses cannot be construed to give either House of Congress any additional affirmative authority to control or regulate the elections in the state. Congress, having been empowered to make regulations only as to the times, places and manner of holding elections for senators and representatives, cannot go beyond these limitations. This conclusion reasonably follows, otherwise it would have been meaningless for the Supreme Court to have so seriously weighed the limits and scopes of Section 4 of Article I, if by the mere application of Sections 5 and 2 it could have held that Congress possessed an additional indefinite, perhaps, limitless authority. It cannot be that the framers of the Constitution, after pointedly fixing the federal authority over elections in Article I, Section 4 intended to give by indirection a blanket authority under Sections 5 and 2. The words of

[4] Newberry v. U. S., 256 U. S. 232: "We find no support in reason or authority for the argument that because the officers where created by the Constitution, Congress has some indefinite, undefined power over elections for senators and representatives not derived from Section 4, Art. I."

[5] Congressional Record, Vol. 46, Page 846.

these latter sections do not lend themselves reasonably to such interpretations and in no opinion has the Supreme Court suggested such a conclusion.[6]

Insofar as Article I, Section 2 is concerned, the word "chosen", used there, is defined in Article I, Section 4, which infers that the method of choosing shall be by election.

DEFENDANTS WERE NOT OFFICERS OR EMPLOYEES OF STATE.

Appellant's brief is based entirely on the premise that commissioners of election, under Louisiana Act 46 of 1940, are state officers. This premise is assumed. The only real argument made to justify this assumption is that the method of their selection is prescribed by statute, and their compensation is provided by the local units of the state government. Appellant also cites the old case[7] which contains a statement that the primary is part of the election machinery of the State.

It is argued that because the State has regulated the activities of the political party and the primary, and has provided for a fair method of selecting the political party's officers and employees, that such officers and employees thereby become state officers. We do not believe that such contention is sound in reason or authority. This is particularly true where the State leaves the entire ad-

[6] See 6 Geo. L. J. 314, 322 (1928).
[7] State v. Michel, 121 La. 374.

ministration of the functions of the nominating primary to the political party and its officers and employees.[8]

Appellant has quoted elaborately from Louisiana Act 46 of 1940 but has overlooked the most important section having a bearing on the issues involved here, which is Section 10.[9]

There is nothing in Louisiana's Act which would justify the conclusion that the defendants here were merely acting as the agent of the State, as was the case in *Nixon v. Condon*, 286 U. S. 73. The commissioners here were merely performing administrative duties on behalf of a political party.

IS PRIMARY SUCH PART OF ELECTION MACHINERY OF STATE THAT WOULD CONSTITUTE COMMISSIONERS OFFICERS OR EMPLOYEES OF STATE? MICHEL CASE DISCUSSED.

The *Michel* case, relied upon by appellant, was decided in 1908 during the early history of the operation of the primary law in this State. It was an attack upon many features of the Act, as it existed at that time.

One of the points raised was that the State had no right to appropriate any of its funds to defray the expenses of

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[8] For further argument on this point see Appellee's Or. Br., p. 22.

[9] Section 10. "The members of the State Central Committee, shall be elected at the first primary election held in the State in January, 1944, for the nomination of State and parish officers, and every four years thereafter. They shall serve without compensation, shall be elected for a period of four years, and shall serve until their successors are elected. They shall never be considered as officers or employees of the State of Louisiana, or any of its subdivisions." (Emphasis supplied.)

the primary, but the Court in holding that it did have such a right, merely stated that the money appropriated was for a public purpose, as the primary was a part of the election machinery of the State. We understand that to mean that under the primary system the political party would have the right to have the name of the candidate nominated by it printed on the State ballot; that the State would recognize the party selected by the political party in printing its ballot; and to that limited extent it was part of the election machinery of the State. This is true in the Texas cases and all other cases which have come before this Court.[10] But, we do not understand that decision to abolish the general concept of the primary or the political party, for on Page 391 of that decision the Court definitely showed that it recognized the distinction which we are arguing here by using the following language:

> "It is of the very essence of a primary that none should have the right to participate in it but those who are in sympathy with the ideas of the political party by which it is being held. Otherwise the party holding the primary would be at the mercy of its enemies, who could participate for the sole purpose of its destruction, by capturing its machinery or foisting upon it obnoxious candidates or doctrines. It stands to reason that none but Democrats should have the right to participate in a Democratic primary and none but Republicans in a Republican primary. *A primary is nothing but a means of expressing party preference*, and it would cease to be that if by the admission of outsiders its result might be the very reverse of the party preference. If, therefore, there

[10] Grovey v. Townsend, 295 U. S. 45; Nixon v. Condon, 286 U. S. 73; Nixon v. Herndon, 273 U. S. 536.

could not be a primary under our Constitution without the admission of outsiders, the consequence would be that under our Constitution such a thing as a primary would be impossible. The argument, therefore, that in a statute-regulated, or compulsory, primary the qualifications of voters cannot be other than as fix d by the Constitution for the general election, would lead to the conclusion that such a primary was a legal impossibility." (Italics supplied.)

and again on Page 393, the Court said further:

"It is not true that it is by delegation from the Legislature that the state central committees hold the power of fixing the political qualifications of the voters at the primary. *They hold said power virtute officii, as being the governing bodies of the political parties. The Legislature has simply abstained from interference, leaving the power where it originally resided and naturally belongs.* And in so doing it has but obeyed the constitutional injunction to pass laws to secure the fairness of primaries. A primary wherein the governing body of the political body holding it could not determine the political qualification of those who are to have the right to participate in it would not only not be fair, but would be a legal monstrosity.

"In conclusion, and as a general commentary upon this statute, we will say that it has been adopted in the exercise of the police power of the state, and that the reader of it cannot but be impressed that its aim has not been to create conditions, or to confer rights or bestow benefits, or to take away rights, but simply to act upon and regulate existing conditions, with a view single to the public interest; that in nearly every state of the Union such a law has been adopted, and the assaults upon it have been repulsed everywhere,

> except in California alone; and that, finally, as expressed by Judge Parker (People v. Dem. Cen. Com., supra), the idea of such a law is 'to permit the voters to construct the organization from the bottom upwards, instead of from the top downwards,' and it would be strange indeed if the Constitution had made such a scheme impossible." (Italics supplied.)

If any other interpretation can be placed upon the holding in that case, we say that such is no longer the law of the State. The primary law, as well as the Constitution of the State has been changed many times since that case was decided. At present, Act 46 of 1940 clearly shows that the Legislature has recognized the independence of the political parties as being free from interference by any officer or employee of the State, and also specifically states that the members of the governing body should not be considered as officers or employees of the State or its subdivisions, and the courts, although not controlled, will always give great deference to the expressions of policy by the Legislature.

PERSON DEFEATED IN PRIMARY CAN BE ELECTED BY VOTERS IN GENERAL ELECTION.

Appellant argues that certain sections of the laws of Louisiana prevent a "write in" vote for a candidate defeated at a primary.[11]

This is incorrect. Appellant has fallen into this error because it relies on Act 160 of 1932, Sec. 1, which is no

[11] (Appellant's Br., pp. 19-22.)

longer in effect, but has been superseded by an amendment to the Constitution of the State found in Act 80 of 1934.

All of the Louisiana cases uniformly hold[12] that the voter cannot be deprived of his freedom of expressing his will at a general election by a restriction placed on the candidate by the Legislature, and that any prohibition against a candidate who was defeated at a primary, does not prevent his election at a general election, nor does it prevent the voter from voting for him at such election. The Constitution of the State protects the voters' rights in this respect.

It is argued that the later provision in Act 160 of 1932[13] was a method devised by the Legislature to prevent the voters from exercising their constitutional right to elect a defeated party candidate by writing his name in on the ballot at the general election.

That was not the reason for the enactment. It was passed to prevent a situation, such as recently occurred, wherein a candidate died the day before the general election, and a person attempted to claim the election by having a number of his friends write in his name at the last minute. It was to give interested parties notice that a contest was to be expected. It was also passed to avoid the necessity of a general election and the expense entailed when in fact the nominee of the party had no opposition.

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[12] Lacombe v. Laborde, 132 La. 435; Seal v. Knight, 10 La. Ap. 563; Payne v. Gentry, 149 La. 707.

[13] No longer in effect.

In Sec. 15 of Art. VIII, as amended by Act 80 of 1934,[13a] no provision is made in the fundamental law which would deprive the voters of electing a person who was defeated at a primary by writing in his name.

On the contrary, that enactment specifically guarantees to the voters the privilege of writing in the names of the candidates on the ballot, and the construction placed upon Sec. 87 of Act 46 of 1940 by the appellant as depriving the voters of this right would render that section of the act unconstitutional.

The aforesaid constitutional article, as amended, clearly so implies. It provides, at least by implication, that a candidate defeated in a primary can be voted for under the condition that he file a statement with the proper authority 10 days before the general election that he is willing and consents to be voted on for that office.

That is a constitutional amendment, voted upon by the people of the State, and there is nothing in it to justify the conclusion that the people have deprived themselves of the right they always enjoyed to vote for any person who was willing to be voted for, by writing his name on the ballot. If the framers of that constitutional amendment intended to deprive the voters of their long recognized right to vote for any candidate who desired their vote, that amendment would have so stated in clear and unmistakable language. If it had so provided, the people would no doubt have defeated it. Any restrictions found in the law is against the candidate, and not the voter,

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[13a] See Appendix, p. 28.

as there is no law in Louisiana which says that a defeated candidate at a primary cannot file a statement signifying his willingness for the voters to vote for him. Such a construction on that act would be in accordance with the policy of the Courts to allow complete freedom to the voters to select the candidate of their choice, and will so remain until the people decide to change the Constitution of the State of Louisiana.

The highest Court of Louisiana has spoken on that subject,[13b] and its finding is entitled to great weight in deciding the policy of the law of the State, as follows:

> "The inhibition placed upon the candidacy at the general election of one who has been defeated in a primary, however does not prevent the voter from voting for the candidate defeated in the primary. The law allows to the voter the right to vote for whom he chooses, and this right cannot be denied him merely because the one for whom he votes is prohibited from being an avowed or official candidate. The intent of the law is to allow the voters the greatest freedom in the expression of his will, and this freedom is not to be interfered with by the Court, in the absence of a clear and unambiguous expression by the lawmaking power of an intent to limit, or restrict within certain bounds, the exercise by the voter of this freedom of choice."

CAN PROVISIONS OF FOURTEENTH AMENDMENT BE INVOKED IN BRIEF WHERE IT FORMS NO PART OF RECORD?

For the first time in the proceedings in this case, appellant invokes the provisions of the 14th Amendment;

[13b] Lacombe v. Laborde, 132 La. 435.

and argues that voters in the primary election were denied the equal protection of the laws by state officers who refuse to count their votes as cast, and counted them in favor of an opposing candidate in violation of the equal protection clause of the 14th Amendment.

This point was never presented to nor passed upon, nor argued in the District Court, (see opinion R. 18-22); it was not specifically raised in the assignment of errors filed in this Court (R. 24); the statement of jurisdiction filed in this Court in compliance with Rule 12, as amended, relied exclusively on the incorrectness of the *Newberry* case.[14] No issue in connection with the 14th Amendment is stated in the jurisdictional statement. It therefore, appears that this question is not properly before this Court.

INDICTMENT FAILS TO CHARGE VIOLATION OF FOURTEENTH AMENDMENT.

Besides, as we read the indictment, it appears that Count 2 would be insufficient to charge defendants with depriving any citizen of the equal protection of the laws under the 14th Amendment. The indictment is drawn exclusively to cover such protection as would be afforded under Section 4 of Article I, of the Constitution. It charges that defendants wilfully subjected registered voters to the deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States, and then

[14] Newberry v. U. S., 256 U. S. 232.

it proceeds to particularize the rights, as follows: Their right to cast their vote for the candidate of their choice, and to have their votes counted for such candidates, as cast. That allegation could only cover such rights as the voters had under Section 4 of Article 1, giving Congress the right to regulate elections. Nowhere in the indictment is it charged by the Grand Jury that the defendants deprived any person of their rights to the equal protection of the laws.

DEFENDANTS ENTITLED TO BE INFORMED OF NATURE AND CAUSE OF ACCUSATION.

To permit the appellant to indict defendants for depriving voters of rights under the Constitution, to-wit: their right to cast their vote for the candidate of their choice and to have their votes counted for such candidates, as cast, (which would be a right which the courts have held is derived from Section 4 of Article I of the Constitution), and then for the first time to contend in an appellate court that such an indictment can be sustained on the theory that the deprivation was not what was alleged, but something different, that is to say, the deprivation of a right under the Constitution, to-wit, the equal protection of the law; would be to deprive these defendants of their rights under Amendment 6 to be informed of the nature and cause of the accusation.[15]

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[15] Amendment 6 of the Constitution provides:
"In all criminal prosecutions the accused shall * * * be informed of the nature and cause of the accusation."

Appellant anticipating this objection, and realizing its force answers it.[16]

In the first place the District Court did not err on this point at all for the point was not even mentioned in that Court.

In the second place, this Court has uniformly held that it is not sufficient to plead the offense in the language of the statute. The necessity is emphasized here when the language of the statute under which the offense is charged is so sweeping that it is capable of embracing innumerable rights, privileges, immunities and acts.

On this subject we believe we need only refer the Court to its holding in the celebrated *Cruikshank* case[17] which has been consistently followed as the law on this point, particularly to that part wherein this Court said,

> "These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every, all and singular' the rights granted them by the Constitution, etc. The language is broad enough to cover all."
>
> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation'. Amend. VI. In U. S. v. Mills, 7 Pet. 142, this was construed to mean, that the indictment must

[16] Br., p. 30 thus:

"It is of no consequence that the indictment does not count in terms upon the 14th Amendment and at the right of the voters to equal protection of the laws. The charge is laid in the language of the statute and specifies as the right 'secured' and 'protected' by the Constitution the right of the voters whose ballots were altered to have their votes counted as cast. If, as we contend, the infringement of that right by the alleged acts of the defendants constitutes a denial of equal protection, it seems clear that the District Court erred in holding that the right is not 'secured' and 'protected' by the Constitution of the United States."

[17] U. S. v. Cruikshank, 92 U. S. 542, 557.

set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged:' and in U. S. v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of the offense whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition: but it must state the species: it must descend to particulars'."

SECTION 20 C. C. WAS ENACTED TO ENFORCE THE ELECTIVE FRANCHISE, AND NOT THE FOURTEENTH AMENDMENT AND DOES NOT EMBRACE RIGHTS PROTECTED BY FOURTEENTH AMENDMENT.

Appellant bases its argument on the statement that Section 20 of the Criminal Code was originally enacted to enforce the 14th Amendment. The genesis of that Section is set forth in the *Gradwell* case.[18]

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[18] U. S. v. Gradwell, 243 U. S. 476:

"* * * in 1870 * * * a comprehensive system for dealing with congressional elections was enacted. This system was comprised in Sec. 19-22 of the Act app. 5/31/79 (16 Stat. at L., p. 144, c. 114) in Sec. 5 and 6 of the Act app. 7/14/70 (16 Stat. at L., p. 254, c. 254) and in the act supplementing these acts, app. 6/10/72 (17 Stat. at L., pp. 347-349, c. 415.)"

"These laws provided extensive regulations for the conduct of congressional elections. * * *"

"These laws were carried into the revision of the United States statutes of 1873-74, under the title, 'Crimes Against the Elective Franchise and Civil Rights of Citizens, R. S. Sec. 5506 to 5532 inclusive.'

"It is a matter of general as of legal history that Congress, after 24 years of experience, returned to its former attitude toward such elections, and repealed all of these laws. * * * (Act app. 2/8/94 (29 Stat. at L. p. 36 c. 25) Comp. Stat. 1913, Sec. 1015). This repealing act left in effect as apparently relating to the elective franchise, only the provisions contained in the 8 sections of Chapter 3 of the Criminal Code Sections 19 to 26, inclusive, which have not been added to or substantially modified during the 23 years which have since eslapsed." (Emphasis supplied.)

It is therefore plain that Section 20 was not enacted for the purpose of enforcing the 14th Amendment, but was enacted to protect the elective franchise and particularly to enforce the 15th Amendment. Appellant contends that the point was settled *sub-silentio* in *Guinn v. U. S.*, 238 U. S. 347, 368; if it was so settled, it is not apposite as the case involved the 15th Amendment.

CRIMINAL STATUTES ARE STRICTLY CONSTRUED: INTENT OF CONGRESS IN PASSING SEC. 20 CRIMINAL CODE.

It is well settled that the only crimes against the United States are those which are statutory, and that statutes creating crimes do not extend to cases not covered by the words used. The Supreme Court of the United States has repeatedly laid down that doctrine.[19]

Congress never intended to include within the sweeping terms of the language of Section 20, the myriad of rights that are protected generally under the broad clauses of the 14th Amendment. To place the construction on

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[19] "There are no common law crimes against the United States."—U. S. v. Eaton, 144 U. S. 677.

"Regards must ALWAYS be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown PLAINLY AND UNMISTAKABLY constitute an offense within the meaning of an Act of Congress."—Bonnelley v. U. S., 276 U. S. 505; Fasulo v. U. S., 272 U. S. 620.

"Statutes creating crimes are to be STRICTLY construed in favor of the accused; they may not be held to extend to cases not covered by the words used."—U. S. v. Resnick, et als., 299 U. S. 207; U. S. v. Wiltberger, 5 Wheat. 76, 95.

"Before one may be punished, it must appear that his case is PLAINLY within the statute; there are no CONSTRUCTIVE offenses."—U. S. v. Lacher, 134 U. S. 624; U. S. v. Chase, 135 U. S. 255."

Sec. 20 contended for here would convert the Federal Court into a veritable police Court, for the activities falling within the scope of the 14th Amendment are so varied that it is not conceivable that Congress intended to include within the general terms of Section 20, all of the rights within the 14th Amendment.

On the contrary, it intended to make only such specific acts that contravened the provisions of the 14th Amendment a violation of the criminal laws of the United States that were specifically denounced in a congressional enactment, the other acts being relegated to the protection of the civil courts. This has been so since the time of the enactment of the 14th Amendment.

CONGRESS PASSES SPECIFIC ACTS TO PUNISH CERTAIN VIOLATIONS OF RIGHTS PROTECTED BY 14TH AMENDMENT.

Section 5 of the 14th Amendment provides that:

> "The Congress shall have power to enforce, by appropriate legislation the provisions of this Article."

Many instances could be cited to show that Congress did not believe that Section 20 applied to all of the rights protected by the 14th Amendment, for whenever it desired to punish acts violating the terms of the equal protection of the law clause, it passed special legislation denouncing the *particular activities* which deprived the person or class of persons of the equal protection of the laws.

There are many such laws.[20]

This Court recognized this fact in *Ex parte Comm. of Va.*, 100 U. S. 313, 317, and stated,

> "Congress, by virtue of the 5th Sec. of the 14th Amend. may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive or the Judicial Department of the State. *The mode of enforcement is left to its dicretion.*" (Italics supplied.)

An examination of the various Congressional enactments discussed in the Civil Rights Cases, *supra*, will disclose that in each instance Congress deemed it necessary to pass specific enactments denouncing these specific activities under the equal protection of the laws clause that it wished to make criminal, and to fix the penalty commensurate with the nature of the activity. Sec. 20 provides a penitentiary sentence, but only a fine is provided for the kind of activity under the statute passed upon in *Ex parte Va.*

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[20] Sec. 5519 read:

"If two or more persons in any State or Territory conspire to go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory, the equal protection of the laws, each of such persons shall be punished, etc."

See also the various enactments passed upon in the Civil Rights Cases, 109 U. S. 3.

See also the statute on which the prosecution in Ex parte Virginia was based, 100 U. S. 339, which sec. read:

"That no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit jurors in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall on conviction thereof, be deemed guilty of a misdemeanor."

supra. This would not have been necessary if Section 20 had the sweeping effect contended for here. It is true that those laws were declared unconstitutional, as being directed at the individual rather than the State, still Congress enacted them under the power that they deemed they had under the 14th Amendment.

5TH AND 6TH AMENDMENTS REQUIRE ASCERTAINABLE STANDARD TO BE FIXED BY CONGRESS, RATHER THAN COURTS AND JURIES.

Under the familiar principle of law that criminal statutes must be so specific that any person reading them would be able to tell whether or not a particular activity would violate a criminal law, it could not be possible that Congress intended that Section 20 should be applied to the thousands of matters and things both grave and minor, embraced within the sweeping terms of the 14th Amendment. Any such construction as contended for here would render Sec. 20 unconstitutional as being too indefinite,[21] and this Court will not give such a construction to a statute as to render it unconstitutional when another reasonable construction can be placed thereon.

To state a *reductio ad absurdum* let us take the very case cited by appellant, for example, the *Iowa-Des Moines*

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[21] Congress, in attempting as it did in the Lever Act of 8/10/17, Sec. 4 (40 Stat. 276) as renacted in the act of 10/22/19, 2 c. 80 (41 Stat. 297) to punish criminally any person who wilfully made 'Any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries", violated the 5th and 6th Amendments, which require an ascertainable standard of guilt, fixed by Congress, rather than by Courts and juries, and secure to accused persons the right to be informed of the nature and cause of accusations against them. U. S. v. L. Cohen Gro. Co., 255 U. S. 81.

Bank v. Bennett case, 284 U. S. 239, where the tax collector discriminated against a foreign corporation in favor of a domestic corporation in collecting taxes. If the discrimination had been a few dollars, those tax collectors would have to go to jail for if appellant's argument holds true here, then it should equally apply to that case.

Sec. 20 would likewise apply to such discriminations by State employees as resulted from the following activities to mention but a few; regulating railroad rates, all relations of employer and employee, all regulations relating to pursuit of occupations such as the practice of professions, etc., all cases arising under condemnation proceedings, all of the various cases whereby the state discriminates in classifications such as taxation, all would be covered by Section 20, and in general, in all matters where the state or its officers or employees exercise the police power of the state in a manner which may be found ultimately to deprive citizens of the equal protection of the law in petty matters as well as in matters of great importance, and the innumerable matters that would arise under that heading, such as zoning regulations, blue-sky regulations, regulations of bill-boards, regulating sales of various merchandise, etc.

It is clear that whenever Congress intended any of such matters to be cognizable under the federal criminal laws, it has passed a definitive statute setting forth the particular activity under the due process of law clause which it intends to make criminal, pursuant to the authority it has under Section 5 of the 14th Amendment.

CASES CITED BY APPELLANT DISCUSSED.

The cases cited by appellant (Br. p. 37) do not set forth any contrary doctrine than that argued here. The cases are all civil cases, with the exception of *Ex parte Virginia* and that case was based on a statute specifically denouncing the act which deprived negroes of the equal protection of the laws when State Officers discriminated against them, and the case illustrates our point.

We do not contend, as was the case in *Ex parte Va.*, that Congress lacks power to pass criminal statutes to enforce the equal protection of the law clause. We say that Congress has not done so, and did not so intend when it passed Sec. 20.

It will be noted that in all of the cases relied upon by appellant [22] there is a direct and intimate connection with the acts resulting in the discriminating against the citizen and the state government, not a fictitious or theoretical one, but a real and systematic connection with the act of the official and the state.

In the *Iowa-Des Moines Nat. Bk.* case, the state insisted on retaining the discriminatory tax, and was sustained by the highest Court in the State; in the *Missouri ex rel. Gaines* case, the curators in refusing the negro admission to the State-operated law school were sustained by the highest Court of the State; in the *Mosher* case and the *C. B. & Q. R. R.* case private property was illegally taken for a subdivision of the state.

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[22] Iowa-Des Moines Bk. vs. Bennett, 284 U. S. 239; Missouri Ex rel Gaines v. Canada, 305 U. S. 337; Mosher v. City of Phoenix, 287 U. S. 29; C. B. & Q. R. R. v. City of Chicago, 166 U. S. 226.

But in this case there is no connection between the state and the election commissioners, even if the court did find them theoretically to be state officers, any more than if they had been charged with stealing the voters' money instead of their ballots because the connection of the actions of the state and the commissioners is too remote, for as was said by this court in *Grovey v. Townsend*, 295 U. S. 45:

> "The argument is that as a negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. *With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by negroes on account of their race or color is prohibited by the Federal Constitution.*" (Italics supplied.)

14TH AMENDMENT EMBRACES ALL CIVIL RIGHTS THAT MEN HAVE: THOSE THAT CONGRESS DESIRED TO PUNISH CRIMINALLY WOULD HAVE TO BE SET FORTH IN CODE OF LAWS.

When the 5th Sec. of the 14th Amendment was proposed in Congress, a clause was offered reading thus:

> "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens

> of each state all the privileges and immunities of citizens in the several states, and to all persons in the several states equal protection in the rights of life, liberty and property."

That, of course, was not adopted, but if it had been, Congress would have then had the power to adopt affirmative legislation, and to make a code of regulations such as it has power to make original laws touching commerce. That code of laws could have extended to the original power embracing all of the rights of the citizen covering immunities, privileges, life, liberty, property and equality.[23]

Here appellants in effect contend that Congress intended Sec. 20 C. C. to accomplish objects and purposes that could only be accomplished by a code of laws covering all of the civil rights of man.

Congress can only, by proper legislation, render harmless hostile legislation or actions of states, or perhaps punish the agents of the State for enumerated and defined acts, which acts would have to be so enumerated and defined because the 14th Amendment covers all of the civil rights that men have.

Where Congress has not merely prohibitory power, but affirmative, original power given up to it by the states, such as to regulate commerce, coin money, carry mail, lay tariff, it is different; it is vested with power of general legislation on those subjects;[24] and it is to one of the rights which Congress has affirmative, original power to enact

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[23] See, Bannon, "The Fourteenth Amendment," pp. 459, 461.
[24] Bannon, "The Fourteenth Amendment, p. 462.

general laws, as contradistinguished from the 14th Amendment, which covers prohibitory power, that Sec. 20 appears to apply.

In passing on the nature of the legislation that Congress can provide under the 14th Amendment, this Court has said:[25]

> *"Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property,* defining them and providing for their vindication. *That would be to establish a code of municipal law regulative of all private rights between man and man in society.* It would be to make Congress take the place of state legislatures, and supersede them. It is absurd to affirm that because the rights of life, liberty and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may therefore enact due process of law in every case; and that because denial by a state to any person of the equal protection of the law is prohibited, therefore Congress may establish laws for their equal protection. *In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation,* this is, such as may be necessary for counteracting such laws as states may adopt, and which, by the amendment, they are prohibited from making, or *such acts or proceedings as the state may commit or take, and which, by the amendment, they are prohibited from committing or taking."* (Italics supplied.)

[25] The Civil Rights Cases, 109 U. S. 3.

When the court said "such acts" it undoubtedly contemplated that Congress would define "such acts" as it intended to punish criminally.

It seems clear from the language of that case that Sec. 20 could have no application to the rights protected by the 14th Amendment for Sec. 20 is all inclusive in scope, and would run counter to just what this Court said could not be done, i. e., "such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property." That section is general legislation, and it is said in the aforesaid opinion, "the legislation which Congress is authorized to adopt in this behalf is not general legislation."

Of course, Congress may under the amendment, provide legislation in advance to meet the exigency when it arises, but when it does so it should specify and define the acts of the states and its agents which are to be criminal cases, all in the manner set forth in the opinion in The Civil Rights cases aforesaid.

CONCLUSION.

With respect to the other points involved in this case, we submit the matter upon what is said in our principal brief.

We respectfully submit that the judgment of the District Court should be affirmed.

WARREN O. COLEMAN,
1329 Whitney Building,
New Orleans, Louisiana,
CHARLES W. KEHL,
FERNANDO J. CUQUET, JR.,
Carondelet Building,
New Orleans, Louisiana,
Attorneys for Defendants
and Appellees.

APPENDIX.

I.

Commissioners Selected Pursuant to Act 46 of 1940, Sec. 61.

Appellant errs when it states in note 2, p. 56 of its brief that the selection of commsisioners at the election involved in this case must have been under sections 2675 and 2678 of La. Gen. Stat. Ann. (Dart, 1939).

Those sections have been entirely superseded by Act 46 of 1940. Although a change in the personnel of the old Parish Committee does not take place until January, 1944, Sec. 19 of Act 46 of 1940 recognizes and continues the old committee in office until the January, 1944 election, but the committee is governed by Act 46 of 1940, and the commissioners of election involved in this case were selected pursuant to Act 46 of 1940, there being no warrant for the assumption that the provisions of Act 46 of 1940 are not operative until January, 1944.

II.

Commissioners Not Paid By State Treasury.

Appellant is incorrect in stating (B. p. 57) that the commissioners receive from the state treasury three dollars for each day's active service, citing Section 2675.

That section has been superseded by Secs. 35 and 61 of Act 46 of 1940, which provides that the municipality shall pay the commissioners. The payment does not come from the State Treasury.

III.

Art. 8, Sec. 15 of Constitution as Amended by Act 80 of 1934.

"The Legislature shall provide some plan by which the voters may prepare their ballots in secrecy at the polls. This section shall not be construed so as to prevent the names of independent candidates from being printed on the ballots with a device; *and names of candidates may be written on the ballot.* These provisions shall not apply to elections for the imposition of special taxes, for which the Legislature shall provide special laws.

"Provided that no person whose name is not authorized to be printed on the official ballot, *as the nominee of a political party* or as an independent candidate, shall be considered a candidate for any office unless he shall have filed with the Clerks of the District Court of the Parish or parishes in which such election is to be held, or the Clerk of the Civil District Court of the Parish of Orleans if he be a resident of the Parish of Orleans, at least ten (10) days before the general election, a statement containing the correct name under which he is to be voted for and containing the further statement that he is willing and consents to be voted for for that office, and provided further that no commissioners of election shall count a ballot as cast for any person whose name is not printed on the ballot or who does not become a candidate in the foregoing manner." (Italics supplied.)

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SUPREME COURT OF THE UNITED STATES.

No. 618.—October Term, 1940.

The United States of America, Appellant, *vs.* Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Feddermann.	Appeal from the District Court of the United States for the Eastern District of Louisiana.

[May 26, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

Two counts of an indictment found in a federal district court charged that appellees, Commissioners of Elections, conducting a primary election under Louisiana law, to nominate a candidate of the Democratic Party for representative in Congress, willfully altered and falsely counted and certified the ballots of voters cast in the primary election. The questions for decision are whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right "secured by the Constitution" within the meaning of §§ 19 and 20 of the Criminal Code, and whether the acts of appellees charged in the indictment violate those sections.

On September 25, 1940, appellees were indicted in the District Court for Eastern Louisiana for violations of §§ 19 and 20 of the Criminal Code, 18 U. S. C. §§ 51, 52. The first count of the indictment alleged that a primary election was held on September 10, 1940, for the purpose of nominating a candidate of the Democratic Party for the office of Representative in Congress for the Second Congressional District of Louisiana, to be chosen at an election to be held on November 10th; that in that district nomination as a candidate of the Democratic Party is and always has been equivalent to an election; that appellees were Commissioners of Election, selected in accordance with the Louisiana law to conduct the primary in the Second Precinct of the Tenth Ward

of New Orleans, in which there were five hundred and thirty-seven citizens and qualified voters.

The charge, based on these allegations, was that the appellees conspired with each other and with others unknown, to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and Laws of the United States, namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast. The overt acts alleged were that the appellees altered eighty-three ballots cast for one candidate and fourteen cast for another, marking and counting them as votes for a third candidate, and that they falsely certified the number of votes cast for the respective candidates to the chairman of the Second Congressional District Committee.

The second count, repeating the allegations of fact already detailed, charged that the appellees, as Commissioners of Election willfully and under color of law subjected registered voters at the primary who were inhabitants of Louisiana to the deprivation of rights, privileges and immunities secured and protected by the Constitution and Laws of the United States, namely their right to cast their votes for the candidates of their choice and to have their votes counted as cast. It further charged that this deprivation was effected by the willful failure and refusal of defendants to count the votes as cast, by their alteration of the ballots, and by their false certification of the number of votes cast for the respective candidates in the manner already indicated.

The District Court sustained a demurrer to counts 1 and 2 on the ground that §§ 19 and 20 of the Criminal Code under which the indictment was drawn do not apply to the state of facts disclosed by the indictment and that, if applied to those facts, §§ 19 and 20 are without constitutional sanction, citing *United States* v. *Gradwell*, 243 U. S. 476, 488, 489; *Newberry* v. *United States*, 256 U. S. 232. The case comes here on direct appeal from the District Court under the provisions of the Criminal Appeals Act, Judicial Code, § 238, 18 U. S. C. § 682; 28 U. S. C. § 345, which authorize an appeal by the United States from a decision or judgment sustaining a demurrer to an indictment where the decision or judgment is

"based upon the invalidity or construction of the statute upon which the indictment is founded".

Upon such an appeal our review is confined to the questions of statutory construction and validity decided by the District Court. *United States* v. *Patten*, 226 U. S. 525; *United States* v. *Birdsell*, 233 U. S. 223, 230; *United States* v. *Borden Co.*, 308 U. S. 188, 192-193. Hence, we do not pass upon various arguments advanced by appellees as to the sufficiency and construction of the indictment.

Section 19 of the Criminal Code condemns as a criminal offense any conspiracy to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States". Section 20 makes it a penal offense for anyone who, "acting under color of any law" "willfully subjects or causes to be subjected any inhabitant of any state . . . to the deprivation of any rights, privileges and immunities secured and protected by the Constitution and laws of the United States". The Government argues that the right of a qualified voter in a Louisiana congressional primary election to have his vote counted as cast is a right secured by Article I, §§ 2 and 4 of the Constitution, and that a conspiracy to deprive the citizen of that right is a violation of § 19, and also that the willful action of appellees as state officials, in falsely counting the ballots at the primary election and in falsely certifying the count, deprived qualified voters of that right and of the equal protection of the laws guaranteed by the Fourteenth Amendment, all in violation of § 20 of the Criminal Code.

Article I, § 2 of the Constitution, commands that "The House of Representatives shall be composed of members chosen every second Year by the People of the several States and the Electors in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature". By § 4 of the same article "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations except as to the Places of chusing Senators". Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2 and to the authority

conferred on Congress by § 4, to regulate the times, places and manner of holding elections for representatives.

We look then to the statutes of Louisiana here involved to ascertain the nature of the right which under the constitutional mandate they define and confer on the voter and the effect upon its exercise of the acts with which appellees are charged, all with the view to determining, first, whether the right or privilege is one secured by the Constitution of the United States, second, whether the effect under the state statute of appellee's alleged acts is such that they operate to injure or oppress citizens in the exercise of that right within the meaning of § 19 and to deprive inhabitants of the state of that right within the meaning of § 20, and finally, whether §§ 19 and 20 respectively are in other respects applicable to the alleged acts of appellees.

Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary. All political parties, which are defined as those that have cast at least 5 per cent of the total vote at specified preceding elections, are required to nominate their candidates for representative by direct primary elections. Louisiana Act No. 46, Regular Session, 1940, §§ 1 and 3.

The primary is conducted by the state at public expense. Act No. 46, *supra*, § 35. The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election, including provisions to insure that the ballots cast at the primary are correctly counted, and the results of the count correctly recorded and certified to the Secretary of State, whose duty it is to place the names of the successful candidates of each party on the official ballot.[1] The Secretary of

[1] The ballots are printed at public expense, § 35 of Act No. 46, Regular Session, 1940, are furnished by the Secretary of State, § 36 in a form prescribed by statute, § 37. Close supervision of the delivery of the ballots to

State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of the Act. Act 46, § 1.

One whose name does not appear on the primary ballot, if otherwise eligible to become a candidate at the general election, may do so in either of two ways, by filing nomination papers with the requisite number of signatures or by having his name "written in" on the ballot on the final election. Louisiana Act No. 224, Regular Session 1940, §§ 50, 73. Section 87 of Act No. 46 provides "No one who participates in the primary election of any political party shall have the right to participate in a primary election of any other political party with the view of nominating opposing candidates, nor shall he be permitted to sign any nomination for any opposing candidate or candidates, nor shall he be permitted to be himself a candidate in opposition to anyone nominated at or through a primary election in which he took part".

Section 15 of Article VIII of the Constitution of Louisiana as amended by Act 80 of 1934, provides that "No person whose name is not authorized to be printed on the official ballot as nominee of a political party or an independent candidate shall be considered a candidate unless he shall file in the appropriate office at least ten days before the general election a statement containing the correct name under which he is to be voted for and containing the further statement that he is willing and consents to be voted for for that office. The article also provides that "no commissioner of election shall count a ballot as cast for any person whose name is not printed on the ballot or who does not become a candidate in the foregoing manner". Applying these provisions the Louisiana Court of Appeals for the Parish of Orleans has held in *Serpas* v. *Trebucq*, decided April 7, 1941, rehearing denied with opinion April 21, 1941, that an unsuccessful candidate at the primary may not offer himself as a candidate at a general election, and that votes for him

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the election commissioners is prescribed, §§ 43-46. The polling places are required to be equipped to secure secrecy, §§ 48-50; §§ 54-57. The selection of election commissioners is prescribed, § 61 and their duties detailed. The commissioners must swear to conduct the election impartially, § 64 and are subject to punishment for deliberately falsifying the returns or destroying the lists and ballots, §§ 98, 99. They must identify by certificate the ballot boxes used, § 67, keep a triplicate list of voters, § 68, publicly canvass the return, § 74 and certify the same to the Secretary of State, § 75.

may not lawfully be written into the ballot or counted at such an election.

The right to vote for a representative in Congress at the general election is, as a matter of law, thus restricted to the successful party candidate at the primary, to those not candidates at the primary who file nomination papers, and those whose names may be lawfully written into the ballot by the electors. Even if, as appellees argue, contrary to the decision in *Serpas* v. *Trebucq, supra,* voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.[2]

Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus as a matter of law and in fact an interference with the effective choice of the voters at the only stage of the election proceedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of

[2] For a discussion of the practical effect of the primary in controlling or restricting election of candidates at general elections, see, Hasbrouck, Party Government in the House of Representatives (1927) 172, 176, 177; Merriam and Overacker, Primary Elections (1928) 267-269; Stoney, Suffrage in the South; 29 Survey Graphic, 163, 164.

the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Mosley*, 238 U. S. 383. And see *Hague* v. *C. I. O.*, 307 U. S. 496, 508, 513, 526, 527, 529, giving the same interpretation to the like phrase "rights" "secured by the Constitution" appearing in § 1 of the Civil Rights Act of 1871, 17 Stat. 13. While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see, *Minor* v. *Happersett*, 21 Wall. 162, 170; *United States* v. *Reese*, 92 U. S. 214, 217-218; *McPherson* v. *Blacker*, 146 U. S. 1, 38-39; *Breedlove* v. *Suttles*, 302 U. S. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers". See *Ex parte Siebold*, 100 U. S. 37; *Ex parte Yarbrough*, *supra*, 663, 664; *Swafford* v. *Templeton*, 185 U. S. 487; *Wiley* v. *Sinkler*, 179 U. S. 58, 64.

Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. *Ex parte Yarbrough*, *supra*; *Wiley* v. *Sinkler*, *supra*; *Swafford* v. *Templeton*, *supra*; *United States* v. *Mosley*, *supra*; see *Ex parte Siebold*, *supra*; *In re Coy*, 127 U. S. 731; *Logan* v. *United States*, 144 U. S. 263. And since the constitutional command is without restriction or limitation, the right unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. *Ex parte Yarbrough*, *supra*; *Logan* v. *United States*, *supra*.

But we are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, § 2. We may assume that the framers of the Constitution

in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Cf. *Davidson* v. *New Orleans*, 96 U. S. 97; *Brown* v. *Walker*, 161 U. S. 591, 595; *Robertson* v. *Baldwin*, 165 U. S. 275, 281, 282. If we remember that "it is a Constitution we are expounding", we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the Constitutional purpose.

That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our Constitutional scheme of government cannot be doubted. We cannot regard it as any the less the constitutional purpose or its words as any the less guarantying the integrity of that choice when a state, exercising its privilege in the absence of Congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election.

Nor can we say that that choice which the Constitution protects is restricted to the second step because § 4 of Article I, as a means of securing a free choice of representatives by the people, has authorized Congress to regulate the manner of elections, without making any mention of primary elections. For we think that the authority of Congress, given by § 4, includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress. The point

whether the power conferred by § 4 includes in any circumstances the power to regulate primary elections was reserved in *United States* v. *Gradwell, supra,* 487. In *Newberry* v. *United States, supra,* four Justices of this Court were of opinion that the term "elections" in § 4 of Article I did not embrace a primary election since that procedure was unknown to the framers. A fifth Justice who with them pronounced the judgment of the Court, was of opinion that a primary law enacted before the adoption of the Seventeenth Amendment, for the nomination of candidates for Senator, was not an election within the meaning of § 4 of Article I of the Constitution, presumably because the choice of the primary imposed no legal restrictions on the election of Senators by the state legislatures to which their election had been committed by Article I, § 3. The remaining four Justices were of the opinion that a primary election for the choice of candidates for Senator or Representative were elections subject to regulation by Congress within the meaning of § 4 of Article I. The question then has not been prejudged by any decision of this Court.

To decide it we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes. As we have said, a dominant purpose of § 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives by the designated electors, that is to say, by some form of election. Cf. the Seventeenth Amendment as to popular "election" of Senators. From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates.

Long before the adoption of the Constitution the form and mode of that expression had changed from time to time. There is no historical warrant for supposing that the framers were under the illusion that the method of effecting the choice of the electors would never change or that if it did, the change was for that reason to be permitted to defeat the right of the people to choose representatives for Congress which the Constitution had guaranteed. The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election whether for

the successful candidate or not. Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact already mentioned that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in *Newberry* v. *United States, supra*, 263-269, 285, 287.

Unless the constitutional protection of the integrity of "elections" extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries.[3] Such an expedient would end that state autonomy with respect to elections which the Constitution contemplated that Congress should be free to leave undisturbed, subject only to such minimum regulation as it should find necessary to insure the freedom and integrity of the choice. Words,

[3] Congress has recognized the effect of primaries on the free exercise of the right to choose the representatives, for it has inquired into frauds at primaries as well as at the general elections in judging the "Elections Returns and Qualificaions of its Own Members", Art. I, § 5. See Grace v. Whaley, H. Rept. No. 158, 63d Cong., 2d Sess.; Peddy v. Mayfield, S. Rept. No. 973, 68th Cong., 2d Sess.; Wilson v. Vare, S. Rept. No 1858, 70th Cong., 2d Sess., S. Rept. No. 47, 71st Cong., 2d Sess., and S. Res. 111, 71st Cong., 2d Sess.

See also Investigation of Campaign Expenditures in the 1940 Campaign, S. Rept. No. 47, 77th Cong., 1st Sess., p. 48 *et seq.*

especially those of a constitution, are not to be read with such stultifying narrowness. The words of §§ 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.

Not only does § 4 of Article I authorize Congress to regulate the manner of holding elections, but by Article I, § 8, Clause 18, Congress is given authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or any department or officer thereof." This provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution. "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to that end which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional". *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. That principle has been consistently adhered to and liberally applied, and extends to the congressional power by appropriate legislation to safeguard the right of choice by the people of representatives in Congress secured by § 2 of Article I. *Ex parte Yarbrough*, *supra*, 657, 658; cf. *Second Employers Liability Cases*, 233 U. S. 1, 49; *Houston & Texas Ry. Co.* v. *United States*, 234 U. S. 342, 350, 355; *Wilson* v. *New, et al.*, 243 U. S. 332, 346, 347; *First National Bank* v. *Union Trust Company*, 244 U. S. 416, 419; *Selective Draft Cases*, 245 U. S. 366, 381; *United States* v. *Ferger, et al.*, 250 U. S. 199, 205; *Hamilton* v. *Kentucky Distillers Co.*, 251 U. S. 146, 155, 163; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180; *United States* v. *Darby*, No. 82, decided February 3, 1941, and cases cited.

There remains the question whether §§ 19 and 20 are an exercise of the congressional authority applicable to the acts with which appellees are charged in the indictment. Section 19 makes it a crime to conspire to "injure" or "oppress" any citizen "in the

free exercise of any right or privilege secured to him by the Constitution".[4] In *Ex parte Yarbrough, supra,* and in *United States* v. *Mosley, supra,* as we have seen, it was held that the right to vote in a congressional election is a right secured by the Constitution, and that a conspiracy to prevent the citizen from voting or to prevent the official count of his ballot when cast, is a conspiracy to injure and oppress the citizen in the free exercise of a right secured by the Constitution within the meaning of § 19. In reaching this conclusion the Court found no uncertainty or ambiguity in the statutory language, obviously devised to protect the citizen "in the free exercise of any right or privilege secured to him by the Constitution", and concerned itself with the question whether the right to participate in choosing a representative is so secured.[5] Such is our function here. Conspiracy to prevent the official count of a citizen's ballot, held in *United States* v. *Mosley, supra,* to be a violation of § 19 in the case of a congressional election, is equally a conspiracy to injure and oppress the citizen when the ballots are cast in a primary election prerequisite to the choice of party candidates for a congressional election. In both cases the right infringed is one secured by the Constitution. The injury suffered by the citizen in the exercise of the right is an injury which the statute describes and to which it applies in the one case as in the other.

The suggestion that § 19, concededly applicable to conspiracies to deprive electors of their votes at congressional elections, is not sufficiently specific to be deemed applicable to primary elections, will hardly bear examination. Section 19 speaks neither of elec-

[4] Section 19 of the Criminal Code (U. S. C., Title 18, Sec. 51):

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." (R. S. § 5508; Mar. 4, 1909, c. 321, § 19, 35 Stat. 1092.)

[5] In United States *v.* Mosley, 238 U. S. 383, 386, the Court thought that "Manifestly the words are broad enough to cover the case", it canvassed at length the objections that § 19 was never intended to apply to crimes against the franchise, and the other contention, which it also rejected, that § 19 had been repealed or so restricted as not to apply to offenses of that class. It is unnecessary to repeat that discussion here.

tions nor of primaries. In unambiguous language it protects "any right or privilege secured by the Constitution", a phrase which as we have seen extends to the right of the voter to have his vote counted in both the general election and in the primary election, where the latter is a part of the election machinery, as well as to numerous other constitutional rights which are wholly unrelated to the choice of a representative in Congress. *United States* v. *Waddell*, 112 U. S. 76; *Logan* v. *United States*, 144 U. S. 263; *In re Quarles*, 158 U. S. 532; *Motes* v. *United States*, 178 U. S. 458; *Guinn* v. *United States*, 238 U. S. 347.

In the face of the broad language of the statute, we are pointed to no principle of statutory construction and to no significant legislative history which could be thought to sanction our saying that the statute applies any the less to primaries than to elections, where in one as in the other it is the same constitutional right which is infringed. It does not avail to attempt to distinguish the protection afforded by § 1 of the Civil Rights Act of 1871,[6] to the right to participate in primary as well as general elections, secured to all citizens by the Constitution, see *Guinn* v. *United States*, 238 U. S. 347; *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73; *Lane* v. *Wilson*, 307 U. S. 268, on the ground that in those cases the injured citizens were Negroes whose rights were clearly protected by the Fourteenth Amendment. At least since *Ex parte Yarbrough*, *supra*, and no member of the Court seems ever to have questioned it, the right to participate in the choice of representatives in Congress has been recognized as a right protected by Art. I, §§ 2 and 4 of the Constitution.[7] Differences of opinion have arisen as to the effect of the primary in particular cases on the choice of representatives. But we are troubled by no such doubt here. Hence, the right to participate through the primary in the choice of representatives in Congress—a right clearly secured by

[6] Section 1 reads: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] See e. g. Guinn v. United States, 238 U. S. 347; United States v. O'Toole, 236 Fed. 993, aff'd United States v. Gradwell, 243 U. S. 476; Acsel v. United States, 232 Fed. 652; Felix v. United States, 186 Fed. 685; Karem v. United States, 121 Fed. 250; Walker v. United States, 93 F. (2d) 383; Luteran v. United States, 93 F. (2d) 395.

the Constitution—is within the words and purpose of § 19 in the same manner and to the same extent as the right to vote at the general election. *United States* v. *Mosley, supra.* It is no extension of the criminal statute, as it was not of the civil statute in *Nixon* v. *Herndon, supra,* to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression.

It is hardly the performance of the judicial function to construe a statute, which in terms protects a right secured by the Constitution, here the right to choose a representative in Congress, as applying to an election whose only function is to ratify a choice already made at the primary but as having no application to the primary which is the only effective means of choice. To withdraw from the scope of the statute, an effective interference with the constitutional right of choice, because other wholly different situations not now before us may not be found to involve such an interference, cf. *United States* v. *Bathgate,* 246 U. S. 220; *United States* v. *Gradwell,* 243 U. S. 476, is to say that acts plainly within the statute should be deemed to be without it because other hypothetical cases may later be found not to infringe the constitutional right with which alone the statute is concerned.

If a right secured by the Constitution may be infringed by the corrupt failure to include the vote at a primary in the official count, it is not significant that the primary, like the voting machine, was unknown when § 19 was adopted.[8] Abuse of either may infringe the right and therefore violate § 19. See *United States* v. *Pleva,* 66 F. (2d) 529, 530; cf. *Browder* v. *United States,* 312 U. S. —. Nor does the fact that in circumstances not here present there may be difficulty in determining whether the primary so affects the right of the choice as to bring it within the constitutional protection, afford any ground for doubting the construction and application of the statute once the constitutional question

[8] No conclusion is to be drawn from the failure of the Hatch Act, 53 Stat. 1147, 18 U. S. C. § 61, to enlarge § 19 by provisions specifically applicable to primaries. Its failure to deal with the subject seems to be attributable to constitutional doubts, stimulated by Newberry v. United States, 256 U. S. 232, which are here resolved. See 84 Cong. Rec., 76th Cong., 1st Sess., p. 4191; cf. Investigation of Campaign Expenditures in the 1940 Campaign, S. Rept. No. 47, 77th Cong., 1st Sess., p. 48.

is resolved. That difficulty is inherent in the judicial administration of every federal criminal statute, for none, whatever its terms, can be applied beyond the reach of the congressional power which the Constitution confers. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *Hoke* v. *United States*, 227 U. S. 308; *Nash* v. *United States*, 229 U. S. 373; *United States* v. *Freeman*, 239 U. S. 117; *United States* v. *F. W. Darby*, No. 82, decided February 3, 1941.

The right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution, and to this § 20 also gives protection.[9] The alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law. *Ex parte Virginia*, 100 U. S. 339, 346; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 287, *et seq.*; *Hague* v. *C. I. O.*, 307 U. S. 496, 507, 519; cf. 101 F. (2d) 774, 790. Here the acts of appellees infringed the constitutional right and deprived the voters of the benefit of it within the meaning of § 20, unless by its terms its application is restricted to deprivations "on account of an inhabitant being an alien or by reason of his color or race".

The last clause of § 20 protects inhabitants of a state from being subjected to different punishments, pains or penalties by reason of alienage, color or race, than are prescribed for the punishment of citizens. That the qualification with respect to alienage, color and race, refers only to differences in punishment and not to deprivations of any rights or privileges secured by the Constitution, is evidenced by the structure of the section and the necessities of the practical application of its provisions. The qualification as to alienage, color and race, is a parenthetical phrase in the clause

[9] Section 20 of the Criminal Code (U. S. C., Title 18, Sec. 52):

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both." (R. S. § 5510; Mar. 4, 1909, c. 321, § 20, 35 Stat. 1092.)

penalizing different punishments "than are prescribed for citizens" and in the common use of language could refer only to the subject matter of the clause and not to that of the earlier one relating to the deprivation of rights to which it makes no reference in terms.

Moreover the prohibited differences of punishment on account of alienage, color or race, are those referable to prescribed punishments which are to be compared with those prescribed for citizens. A standard is thus set up applicable to differences in prescribed punishments on account of alienage, color or race, which it would be difficult if not impossible to apply to the willful deprivations of constitutional rights or privileges, in order to determine whether they are on account of alienage, color or race. We think that § 20 authorizes the punishment of two different offenses. The one is willfully subjecting any inhabitant to the deprivation of rights secured by the Constitution; the other is willfully subjecting any inhabitant to different punishments on account of his color or race, than are prescribed for the punishment of citizens. The meager legislative history of the section supports this conclusion.[10]

So interpreted § 20 applies to deprivation of the constitutional rights of qualified voters to choose representatives in Congress. The generality of the section made applicable as it is to deprivations of any constitutional right, does not obscure its meaning or impair its force within the scope of its application, which is restricted by its terms to deprivations which are willfully inflicted by those acting under color of any law, statute and the like.

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[10] The precursor of § 20 was § 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, which reads:

"That any person who, under color of any law, statute, ordinance, regulation, or custom shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction shall be punished by fine. . . ."

This section, so far as now material, was in substance the same as § 20 except that the qualifying reference to differences in punishment made no mention of alienage, the reference being to "different punishment on account of such person having at any time been held in a condition of slavery or involuntary servitude".

Senator Trumbull, the putative author of S. 61, 39th Cong., 1st Sess., the Civil Rights Bill of 1866, and Chairman of the Senate Judiciary Committee which reported the bill, in explaining it stated that the bill was "to protect

We do not discuss the application of § 20 to deprivations of the right to equal protection of the laws guaranteed by the Fourteenth Amendment, a point apparently raised and discussed for the first time in the Government's brief in this Court. The point was not specially considered or decided by the court below, and has not been assigned as error by the Government. Since the indictment on its face does not purport to charge a deprivation of equal protection to voters or candidates, we are not called upon to construe the indictment in order to raise a question of statutory validity or construction which we are alone authorized to review upon this appeal.

Reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

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all persons in the United States in their civil rights and furnishes the means of their vindication. . . ." Cong. Globe, 39th Cong., 1st Sess., p. 211. He also declared, "The bill applies to white men as well as black men". Cong. Globe, 39th Cong., 1st Sess., p. 599. Opponents of the bill agreed with this construction of the first clause of the section, declaring that it referred to the deprivation of constitutional rights of all inhabitants of the states of every race and color. Pp. 598, 601.

On February 24, 1870, Senator Stewart of Nevada, introduced S. 365, 41st Cong., 2d Sess., § 2 of which read:

"That any person who under color of any law, statute, ordinance, regulation or custom shall subject, or cause to be subjected any inhabitant or any State or Territory to the deprivation of any rights secured or protected by this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor. . . ."

In explaining the bill he declared, Cong. Globe, 41st Cong., 2d Sess., p. 1536, that the purpose of the bill was to extend its benefits to aliens, saying, "It extends the operation of the Civil Rights Bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States." The Committee reported out a substitute bill to H. R. 1293, to which S. 365 was added as an amendment. As so amended the bill when adopted became the present § 20 of the Criminal Code which read exactly as did § 2 of the Civil Rights Act, except that the word "aliens" was added and the word "citizens" was substituted for the phrase "white persons".

While the legislative history indicates that the immediate occasion for the adoption of § 20, like the Fourteenth Amendment itself, was the more adequate protection of the colored race and their civil rights, it shows that neither was restricted to that purpose and that the first clause of § 20 was intended to protect the constitutional rights of all inhabitants of the states. H. R. 1293, 41st Cong., 2d Sess., which was later amended in the Senate to include § 2 of S. 365 as § 17 of the bill as it passed, now § 20 of the Criminal Code, was originally entitled "A bill to enforce the right of citizens of the United States to vote in the several states of this Union who have hitherto been denied that right on account of race, color or previous condition of servitude". When the bill came to the Senate its title was amended and adopted to read, "A bill to enforce the right of citizens of the United States to vote in the several states of this Union and for other purposes."

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SUPREME COURT OF THE UNITED STATES.

No. 618.—October Term, 1940.

The United States of America, Appellant, *vs.* Patrick B. Classic, John A. Morris, Bernard W. Yeager, Jr., William Schumacher, and J. J. Fleddermann.	Appeal from the District Court of the United States for the Eastern District of Louisiana.

[May 26, 1941.]

Mr. Justice Douglas, dissenting.

Free and honest elections are the very foundation of our republican form of government. Hence any attempt to defile the sanctity of the ballot cannot be viewed with equanimity. As stated by Mr. Justice Miller in *Ex parte Yarbrough*, 110 U. S. 651, 666, "the temptations to control these elections by violence and corruption" have been a constant source of danger in the history of all republics. The acts here charged, if proven, are of a kind which carries that threat and are highly offensive. Since they corrupt the process of Congressional elections, they transcend mere local concern and extend a contaminating influence into the national domain.

I think Congress has ample power to deal with them. That is to say I disagree with *Newberry* v. *United States*, 256 U. S. 232, to the extent that it holds that Congress has no power to control primary elections. Art. I, § 2 of the Constitution provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Art I, § 4 provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." And Art. I, § 8, clause 18 gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Those sections are an

arsenal of power ample to protect Congressional elections from any and all forms of pollution. The fact that a particular form of pollution has only an indirect effect on the final election is immaterial. The fact that it occurs in a primary election or nominating convention is likewise irrelevant. The important consideration is that the Constitution should be interpreted broadly so as to give to the representatives of a free people abundant power to deal with all the exigencies of the electoral process. It means that the Constitution should be read so as to give Congress an expansive implied power to place beyond the pale acts which, in their direct or indirect effect, impair the integrity of Congressional elections. For when corruption enters, the election is no longer free, the choice of the people is affected. To hold that Congress is powerless to control these primaries would indeed be a narrow construction of the Constitution inconsistent with the view that that instrument of government was designed not only for contemporary needs but for the vicissitudes of time.

So I agree with most of the views expressed in the opinion of the Court. And it is with diffidence that I dissent from the result there reached.

The disagreement centers on the meaning of § 19 of the Criminal Code which protects every right secured by the Constitution. The right to vote at a final Congressional election and the right to have one's vote counted in such an election have been held to be protected by § 19. *Ex parte Yarbrough, supra; United States* v. *Mosley*, 238 U. S. 383. Yet I do not think that the principles of those cases should be, or properly can be, extended to primary elections. To sustain this indictment we must so extend them. But when we do, we enter perilous territory.

We enter perilous territory because, as stated in *United States* v. *Gradwell*, 243 U. S. 476, 485, there is no common law offense against the United States; "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *United States* v. *Hudson*, 7 Cranch 32, 34. If a person is to be convicted of a crime, the offense must be clearly and plainly embraced within the statute. As stated by Chief Justice Marshall in *United States* v. *Wiltberger*, 5 Wheat. 76, 105, "probability is not a guide which a court, in construing a penal statute, can safely take." It is one

thing to allow wide and generous scope to the express and implied powers of Congress; it is distinctly another to read into the vague and general language of an act of Congress specifications of crimes. We should ever be mindful that "before a man can be punished, his case must be plainly and unmistakably within the statute." *United States* v. *Lacher*, 134 U. S. 624, 628. That admonition is reemphasized here by the fact that § 19 imposes not only a fine of $5,000 and ten years in prison but also makes him who is convicted "ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated and then to particularize it as a crime because it is highly offensive. Cf. *James* v. *Bowman*, 190 U. S. 127. Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference.

Sec. 19 does not purport to be an exercise by Congress of its power to regulate primaries. It merely penalizes conspiracies "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States". Thus, it does no more than refer us to the Constitution[1] for the purpose of determining whether or not the right to vote in a primary is there secured. Hence we must do more than find in the Constitution the power of Congress to afford that protection. We must find that protection on the face of the Constitution itself. That is to say, we must in view of the wording of § 19 read the relevant provisions of the Constitution for the purposes of this case through the window of a criminal statute.

There can be put to one side cases where state election officials deprive negro citizens of their right to vote at a general election (*Guinn* v. *United States*, 238 U. S. 347), or at a primary. *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73. Discrimination on the basis of race or color is plainly outlawed by the Fourteenth Amendment. Since the constitutional mandate is plain, there is no reason why § 19 or § 20 should not be applicable. But the situation here is quite different. When we turn to the

[1] While § 19 also refers to "laws of the United States", § 19 and § 20 are the only statutes directly in point.

constitutional provisions relevant to this case we find no such unambiguous mandate.

Art. I, § 4 specifies the machinery whereby the times, places and manner of holding elections shall be established and controlled. Art. I, § 2 provides that representatives shall be "chosen" by the people. But for purposes of the criminal law as contrasted to the interpretation of the Constitution as the source of the implied power of Congress, I do not think that those provisions in absence of specific legislation by Congress protect the primary election or the nominating convention. While they protect the right to vote and the right to have one's vote counted at the final election as held in the *Yarbrough* and *Mosley* cases, they certainly do not *per se* extend to all acts which in their indirect or incidental effect restrain, restrict, or interfere with that choice. Bribery of voters at a general election certainly is an interference with that freedom of choice. It is a corruptive influence which for its impact on the election process is as intimate and direct as the acts charged in this indictment. And Congress has ample power to deal with it. But this Court in *United States* v. *Bathgate*, 246 U. S. 220, by a unanimous vote, held that conspiracies to bribe voters at a general election were not covered by § 19. While the conclusion in that case may be reconciled with the results in the *Yarbrough* and *Mosley* cases on the ground that the right to vote at a general election is personal while the bribery of voters only indirectly affects that personal right, that distinction is not of aid here. For the failure to count votes cast at a primary has by the same token only an indirect effect on the voting at the general election. In terms of causal effect tampering with the primary vote may be as important on the outcome of the general election as bribery of voters at the general election itself. Certainly from the viewpoint of the individual voter there is as much a dilution of his vote in the one case as in the other. So, in light of the *Mosley* and *Bathgate* cases, the test under § 19 is not whether the acts in question constitute an interference with the effective choice of the voters. It is whether the voters are deprived of their votes in the general election. Such a test comports with the standards for construction of a criminal law, since it restricts § 19 to protection of the rights plainly and directly guaranteed by the Constitution. Any other test entails an inquiry into the indirect or incidental effect on the general election of the acts done. But in view of the generality of the

words employed such a test would be incompatible with the criteria appropriate for a criminal case.

The *Mosley* case, in my view, went to the verge when it held that § 19 and the relevant constitutional provisions made it a crime to fail to count votes cast at a general election. That Congress intended § 19 to have that effect was none too clear. The dissenting opinion of Mr. Justice Lamar in that case points out that § 19 was originally part of the Enforcement Act of May 31, 1870, c. 114, § 6; 16 Stat. 140. Under another section of that act (§ 4), which was repealed by the Act of February 8, 1894 (28 Stat. 36) the crime charged in the *Mosley* case would have been punishable by a fine of not less than $500 and imprisonment for 12 months.[2] Under § 19 it carried, as it still does, a penalty of $5000 and ten years in prison. The Committee Report (H. Rep. No. 18, 53d Cong., 1st Sess.) which recommended the repeal of other sections clearly indicated an intent to remove the hand of the Federal Government from such elections and to restore their conduct and policing to the states. As the Report stated (p. 7): "Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections many of our States have enacted laws to protect the voter and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficently; and if these Federal statutes are repealed that sentiment will receive an impetus which, if the cause still exists, will carry such enactments in every State in the Union." In view of this broad, comprehensive program of repeal it is not easy to conclude that the general language of § 19 which was not repealed not only continued in effect much which had been re-

[2] Sec. 5506, Rev. Stat.: "Every person who, by any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting at any election . . . shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment." Sec. 5511 provided: "If, at any election for Representative or Delegate in Congress, any person . . . knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote . . . he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both . . . ."

pealed but also upped the penalties for certain offenses which had been explicitly covered by one of the repealed sections. Mr. Justice Holmes, writing for the majority in the *Mosley* case, found in the legislative and historical setting of § 19 and in its revised form a Congressional interpretation which, if § 19 were taken at its face value, was thought to afford voters in final Congressional elections general protection. And that view is a tenable one since § 19 originally was part of an Act regulating general elections and since the acts charged had a direct rather than an indirect effect on the right to vote at a general election.

But as stated by a unanimous court in *United States* v. *Gradwell, supra,* p. 486, the *Mosley* case "falls far short" of making § 19 "applicable to the conduct of a state nominating primary". Indeed, Mr. Justice Holmes, the author of the *Mosley* opinion, joined with Mr. Justice McReynolds in the *Newberry* case in his view that Congress had no authority under Art. I, § 4 of the Constitution to legislate on primaries. When § 19 was part of the Act of May 31, 1870, it certainly would never have been contended that it embraced primaries, for they were hardly known at that time.[3] It is true that "even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States,* 312 U. S. 335, 340. Yet the attempt to bring under § 19 offenses "committed in the conduct of primary elections or nominating caucuses or conventions" was rejected in the *Gradwell* case, where this Court said that in absence of legislation by Congress on the subject of primaries it is not for the courts "to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. . . . the section of the Criminal Code relied upon, originally enacted for the protection of the civil rights of the then lately enfranchised negro, cannot be extended so as to make it an agency for enforcing a state primary law." 243 U. S. pp. 488-489. The fact that primaries were hardly known when § 19 was enacted, the fact that it was part of a legislative program governing general elections not primary elections, the fact that it has been in nowise implemented by legislation directed at primaries give credence to the unanimous view in the *Gradwell* case that § 19 has not by the mere passage of time taken

[3] Merriam & Overacker, Primary Elections (1928) chs. I-III, V; Sait, American Parties & Elections (1927) ch. X; Brooks, Political Parties & Electoral Problems (1933) ch. X.

on a new and broadened meaning. At least it seems plain that the difficulties of applying the historical reason adduced by Mr. Justice Holmes in the *Mosley* case to bring general elections within § 19 are so great in case of primaries that we have left the safety zone of interpretation of criminal statutes when we sustain this indictment. It is one thing to say, as in the *Mosley* case, that Congress was legislating as respects general elections when it passed § 19. That was the fact. It is quite another thing to say that Congress by leaving § 19 unmolested for some seventy years has legislated unwittingly on primaries. Sec. 19 was never part of an act of Congress directed towards primaries. That was not its original frame of reference. Therefore, unlike the *Mosley* case, it cannot be said here that § 19 still covers primaries because it was once an integral part of primary legislation.

Furthermore, the fact that Congress has legislated only sparingly and at infrequent intervals even on the subject of general elections (*United States* v. *Gradwell, supra*) should make us hesitate to conclude that by mere inaction Congress has taken the greater step, entered the field of primaries, and gone further than any announced legislative program has indicated. The acts here charged constitute crimes under the Louisiana statute. La. Act No. 46, Reg. Sess. 1940, § 89. In absence of specific Congressional action we should assume that Congress has left the control of primaries and nominating conventions to the states—an assumption plainly in line with the Committee Report, quoted above, recommending the repeal of portions of the Enforcement Act of May 31, 1870 so as to place the details of elections in state hands. There is no ground for inference in subsequent legislative history that Congress has departed from that policy by superimposing its own primary penal law on the primary penal laws of the states. Rather, Congress has been fairly consistent in recognizing state autonomy in the field of elections. To be sure, it has occasionally legislated on primaries.[4] But even when dealing specifically with the nominating process, it has never made acts of the kind here in question a crime. In this connection it should be noted that the bill which became the Hatch Act (53 Stat. 1147; 18 U. S. C. § 61) contained a section which made it unlawful "for any person to intimidate, threaten, or coerce, or to attempt to intim-

[4] Act of June 25, 1910, c. 392, 36 Stat. 822, as amended by the Act of August 19, 1911, c. 33, 37 Stat. 25; Act of October 16, 1918, c. 187, 40 Stat. 1013.

idate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for or not to vote for any candidate for the nomination of any party as its candidate" for various federal offices including representatives "*at any primary or nominating convention* held solely or in part" for that purpose. This was stricken in the Senate. 84 Cong. Rec., pt. 4, 76th Cong., 1st Sess., p. 4191. That section would have extended the same protection to the primary and nominating convention as § 1 of the Hatch Act[5] extends to the general election. The Senate, however, refused to do so. Yet this Court now holds that § 19 has protected the primary vote all along and that it covers conspiracies to do the precise thing on which Congress refused to legislate in 1939. The hesitation on the part of Congress through the years to enter the primary field, its refusal to do so[6] in 1939, and the restricted scope of such primary laws as it has passed should be ample evidence that this Court is legislating when it takes the initiative in extending § 19 to primaries.

We should adhere to the strict construction given to § 19 by a unanimous court in *United States* v. *Bathgate, supra,* p. 226, where it was said: "Section 19, Criminal Code, of course, now has the same meaning as when first enacted . . . and considering the policy of Congress not to interfere with elections within a State except by clear and specific provisions, together with the rule respecting construction of criminal statutes, we cannot think it was intended to apply to conspiracies to bribe voters." That leads to the conclusion that § 19 and the relevant constitutional provisions should be read so as to exclude all acts which do not have the direct effect of depriving voters of their right to vote at general elections. That

[5] "That it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, a Presidential elector, or any Member of the Senate or any Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions."

[6] Sec. 2 of the Hatch Act, however, does make unlawful certain acts of administrative employees even in connection with the nominations for certain federal offices. And see 54 Stat. 767, No. 753, ch. 640, 76th Cong., 3d Sess. As to the power of Congress over employees or officers of the government see United States v. Wurzbach, 280 U. S. 396.

view has received tacit recognition by Congress. For the history of legislation governing Federal elections shows that the occasional Acts of Congress[7] on the subject have been primarily directed towards supplying detailed regulations designed to protect the individual's constitutional right to vote against pollution and corruption. Those laws, the latest of which is § 1 of the Hatch Act, are ample recognition by Congress itself that specific legislation is necessary in order to protect the electoral process against the wide variety of acts which in their indirect or incidental effect interfere with the voter's freedom of choice and corrupt the electoral process. They are evidence that detailed regulations are essential in order to reach acts which do not directly interfere with the voting privilege. They are inconsistent with the notions in the opinion of the Court that the Constitution unaided by definite supplementary legislation protects the methods by which party candidates are nominated.

That § 19 lacks the requisite specificity necessary for inclusion of acts which interfere with the nomination of party candidates is reemphasized by the test here employed. The opinion of the Court stresses, as does the indictment, that the winner of the Democratic primary in Louisiana invariably carries the general election. It is also emphasized that a candidate defeated in the Louisiana primaries cannot be a candidate at the general election. Hence, it is argued that interference with the right to vote in such a primary is "as a matter of law and in fact an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance," and that the "primary in Louisiana is an integral part of the procedure for the popular choice" of representatives. By that means the *Gradwell* case is apparently distinguished. But I do not think it is a valid distinction for the purposes of this case.

One of the indictments in the *Gradwell* case charged that the defendants conspired to procure one thousand unqualified persons to vote in a West Virginia primary for the nomination of a United States Senator. This Court, by a unanimous vote, affirmed the judgment which sustained a demurrer to that indictment. The Court specifically reserved the question as to whether a "primary

[7] See for example, Act of May 31, 1870, 16 Stat. 140; Act of July 14, 1870, 16 Stat. 254, 255-256; Act of Feb. 28, 1871, 16 Stat. 433; Act of June 25, 1910, 36 Stat. 822; Act of August 19, 1911, 37 Stat. 25; Act of August 23, 1912, 37 Stat. 360; Act of October 16, 1918, 40 Stat. 1013; Federal Corrupt Practices Act, 1925, 43 Stat. 1070; Hatch Act, August 2, 1939, 53 Stat. 1147.

should be treated as an election within the meaning of the Constitution". But it went on to say that even assuming it were, certain "strikingly unusual features" of the particular primary precluded such a holding in that case. It noted that candidates of certain parties were excluded from the primary and that even candidates who were defeated at the primary could on certain conditions be nominated for the general election. It therefore concluded that whatever power Congress might have to control such primaries, it had not done so by § 19.

If the *Gradwell* case is to survive, as I think it should, we have therefore this rather curious situation. Primaries in states where the winner invariably carries the general election are protected by § 19 and the Constitution, even though such primaries are not by law an integral part of the election process. Primaries in states where the successful candidate never wins, seldom wins, or may not win in the general election are not so protected, unless perchance state law makes such primaries an integral part of the election process. Congress having a broad control over primaries might conceivably draw such distinctions in a penal code. But for us to draw them under § 19 is quite another matter. For we must go outside the statute, examine local law and local customs, and then on the basis of the legal or practical importance of a particular primary interpret the vague language of § 19 in the light of the significance of the acts done. The result is to make refined and nice distinctions which Congress certainly has not made, to create unevenness in the application of § 19 among the various states, and to make the existence of a crime depend, not on the plain meaning of words employed interpreted in light of the legislative history of the statute, but on the result of research into local law or local practices. Unless Congress has explicitly made a crime dependent on such facts, we should not undertake to do so. Such procedure does not comport with the strict standards essential for the interpretation of a criminal law. The necessity of resorting to such a circuitous route is sufficient evidence to me that we are performing a legislative function in finding here a definition of a crime which will sustain this indictment. A crime, no matter how offensive, should not be spelled out from such vague inferences.

Mr. Justice BLACK and Mr. Justice MURPHY join in this dissent.